1962

G. L. Hackett & Co. v. Thompson Flying Service of Salt Lake City, Inc. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

G. L. HACKETT & COMPANY, a corporation,

Plaintiff and Respondent,

—vs.—

THOMPSON FLYING SERVICE OF SALT LAKE CITY, INC.,

Defendant and Appellant.

No. 9613

APPELLANT'S BRIEF

Appeal from the Judgment of the Third District Court
for Salt Lake County
HON. RAY VAN COTT, JR., *Judge*

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CASES CITED

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APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for property damage to an airplane owned by plaintiff's assignor, arising out of a fire at an airplane hangar operated by the defendant.

DISPOSITION IN LOWER COURT

The case was tried to a jury. From a verdict and judgment for the plaintiff, defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the judgment and entry of judgment in its favor as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

Plaintiff brought the present action in two counts, claiming as assignee of one Gary Brimhall, the owner of a certain Bellanca Airplane. (R. 1-2). Plaintiff's first count is based upon the theory of conversion. (R. 1.); the second count is based upon the theory of negligence. (R. 1-2). Defendant by its answer admitted that a fire occurred in the hangar where the plane was stored. (R. 4.) All of the other material allegations of the complaint were denied. (R. 3-4).

At trial, the only evidence offered by the plaintiff was the testimony of Gary Brimhall, the owner of the airplane in question. The sum and substance of Brimhall's testimony was that he arranged with defendant for the rental of a "T" hangar at Municipal Airport #1. It was his understanding of the agreement that he rented the No. 1 "T" hangar, and had the right to the exclusive use of

it. Defendant had no right to go into it for any purpose. Neither did anyone else have a right to go into it for any purpose. He was not paying for airplane storage, but for hangar space. He parked his car in the hangar when he was flying the plane. (R. 28-29).

Brimhall last flew the plane around Thanksgiving of 1960. (R. 26). Some time thereafter, the exact or approximate date of which was not established, Brimhall discovered that his plane had been removed from the "T" hangar and placed in a larger hangar owned and operated by defendant, with several other planes. (R. 26). Brimhall made no complaint whatsoever to defendant about this and he assumed that the plane was removed because his account was delinquent. Admittedly, at the time of the fire, his account was delinquent in approximately the amount of $2200. (R. 26-27). He never asked permission to fly the plane after it was removed to the large hangar. He admitted that he was never refused permission to fly it, and that he made no protest to defendant concerning the removal of the plane. (R. 27).

The entire thrust of Brimhall's testimony was to the effect that the relationship between himself and defendant was one of landlord and tenant, and not of bailment or storage. He regarded himself as the lessee of "T" Hangar #1, and he interpreted the removal of the plane from "T" Hangar #1 as a conversion of the plane. Upon the presentation of Brimhall's testimony, the plaintiff rested. (R. 32). Defendant likewise rested with-

out having offered any evidence at all. (R 32). Promptly thereafter, defendant moved for a directed verdict on both counts of plaintiff's complaint for the following grounds and reasons:

A. As to the first count:

1. That there was no evidence of a conversion; and

2. That defendant had a right, as lienor, to take possession of the plane. (R. 32).

B. As to the negligence count:

1. That there was no evidence of any contract of bailment between the owner and the defendant;

2. That there was no evidence of any negligence on the part of the defendant; and

3. That there was no evidence that any negligence on the part of defendant caused the fire. (R. 33).

After argument this motion was denied by the court, (R. 33), and the case was submitted to the jury on both of plaintiff's theories. (R. 61-67). With regard to the negligence count, the Court, by its instruction No. 6, charged the jury as follows:

> "If you find from the evidence in this case that the relationship between Brimhall and the Thompson Flying Service was that of bailment and, if you further find that Brimhall's airplane

> was damaged as a result of a fire while it was in the possession of the defendant you may infer from that fact that the defendant was negligent and that his negligence was the proximate cause of the damage to the airplane. Such an inference does not amount to a preponderance of the evidence but you may use such inference as a basis for finding by a preponderance of the evidence that the defendant was negligent." (R. 67).

Defendant duly excepted to the giving of said instruction. (R. 34). Defendant by its request No. 11, requested the Court to charge the jury as follows:

> "You are instructed that the mere fact that a fire occurred, standing alone, is no evidence of any negligence on the part of defendant." (R.51)

Exception was likewise taken to the court's refusal to grant this request. (R. 34).

The jury returned a verdict favorable to the defendant and against the plaintiff on the first count, that is, the conversion count, and in favor of the plaintiff and against the defendant on the second, or negligence count, in the stipulated amount of the damages, less the agreed set-off for storage charges, or a total of $4,997.55. (R. 75).

Defendant made a timely motion to set aside the verdict and judgment and to enter judgment for the defendant, or in the alternative for a new trial (R. 77), which motion was in due course argued to the court and denied. (R. 78). This appeal followed. (R. 79)

STATEMENT OF POINTS UPON WHICH APPELLANT RELIES

POINT I.

PLAINTIFF HAVING TRIED THE CASE ON THE THEORY OF CONVERSION, WAS ESTOPPED TO RELY UPON THE THEORY OF NEGLIGENCE AS A GROUND OF RECOVERY.

POINT II.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT A VERDICT AND JUDGMENT IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANT UPON THE THEORY OF NEGLIGENCE, AND THE VERDICT AND JUDGMENT ARE CONTRARY TO THE EVIDENCE, AND CONTRARY TO LAW.

POINT III.

THE COURT DID NOT CORRECTLY INSTRUCT THE JURY, AS TO THE RIGHTS OF PLAINTIFF, OR AS TO THE DUTIES OF DEFENDANT, OR AS TO THE LAW OF BAILMENT APPLICABLE TO THE FACTS OF THIS CASE.

ARGUMENT

POINT I.

PLAINTIFF HAVING TRIED THE CASE ON THE THEORY OF CONVERSION, WAS ESTOPPED TO RELY UPON THE THEORY OF NEGLIGENCE AS A GROUND OF RECOVERY.

The position consistently taken by the plaintiff in this case, in its pleadings, at pretrial, and at trial, has been that the relationship between the owner Brimhall

and the defendant was that of landlord and tenant, and that when the defendant removed the owner's airplane from the "T" hangar and placed it in another hangar, defendant was guilty of conversion. Upon this theory the case was tried. This was the burden and effect of the only proof offered by plaintiff at trial, the testimony of the owner Brimhall, and having elected to proceed upon that theory, plaintiff was estopped to rely upon the theory of negligence, based upon a bailment relationship.

Although there is no extensive authority on this point, so far as our research reveals, one recent Ohio case fairly indicates the rule. *United Fire Insurance Co. v. Paramount Fur Service, Inc.,* 168 Ohio St. 431, 156 NE2d 121. In that case the owner had bailed her fur for storage with the defendant. The original bailor, without the authority of the owner, had entered into a sub-contract of bailment with another. While the fur was in the possession of the sub-bailee, it was lost or destroyed. Plaintiff proceeded against the original bailee upon the theory of conversion. However, recovery against the bailee was limited to the sum of $100, that being the agreed value of the cost according to the contract of bailment. Plaintiff then sought to recover against the sub-bailee upon the theory of negligence. The court held that having elected to treat the original bailee as a converter, the owner could not take the inconsistent position of suing the second bailee for loss resulting from negligence.

Although the present case does not involve separate bailees, the logic of the Ohio Court in that case is equally applicable here. Having elected to proceed against the defendant upon the theory of conversion, plaintiff is estopped to rely on the inconsistent theory of negligence, arising out of a relationship entirely different from that attempted to be proved by plaintiff at trial.

POINT II.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT A VERDICT AND JUDGMENT IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANT UPON THE THEORY OF NEGLIGENCE, AND THE VERDICT AND JUDGMENT ARE CONTRARY TO THE EVIDENCE, AND CONTRARY TO LAW.

Plaintiff, having alleged and relied upon, and having attempted to prove, a contract of landlord and tenant, cannot now claim that the original contract was one of bailment for hire. If there was any bailment whatsoever, it was a constructive bailment resulting from the failure of defendant to commence foreclosure proceedings on its landlord's lien within 30 days after termination of the tenancy relationship. As heretofore noted there is no evidence in the record as to the time when the plane was removed from the "T" hangar to the big hangar, and therefore there is *no* evidence, much less a preponderance of the evidence, from which a jury could find that the 30 day period had elapsed, and that defendant had become a constructive bailee. Assuming, however,

that the 30 day period had elapsed, defendant, if a bailee at all, would be only a constructive bailee, that is, a gratuitous bailee.

This rule is also expressed in the case of *United Fire Insurance Co. v. Paramount Fur Service, Inc.*, 168 Ohio St. 431, 156 NE2d 121. The court there said:

> "Where otherwise than by a mutual contract of bailment, one person has lawfully acquired the possession of personal property of another, the one in possession is, by operation of law, generally treated as a bailee of such property and may therefore reasonably be referred to as a constructive bailee. . ."

See also *Armored Car Service, Inc. v. First National Bank,* (Fla. App.), 114 So. 2d 431, where the court said:

> "Therefore, where the possession of one's personal property passes to another by mistake, accident or through force of circumstances under which the law imposes upon the recipient thereof the duty and obligation of a bailee, when there is a lack of a meeting of the minds, an absence of any voluntary undertaking, and no reasonable basis for implying an interest of an mutual benefit, the bailment resulting is a constructive bailment and gratuitious."

Defendant, if a bailee at all, was a constructive bailee, or gratuitous bailee, and as such owed the owner a duty only of slight care, or stated differently, would be liable only for gross negligence in the storage of the airplane. The rule is stated in 6A Am. Jur., 363, et seq., Bailments, § 257, as follows:

> "Authorities following the rule that a bailee acting without reward is liable only in case of gross negligence, viewed as a failure to exercise slight care or diligence, have held that the care required of such a bailee is not to be measured by that which a reasonably prudent man, or a person of ordinary prudence and care, would exercise, with reference to his own property under similar circumstances, and that such a bailee is not bound to ordinary diligence or that which the generality of mankind use in their own concerns."

To the same effect, see 6A Am. Jur. 360-1, Bailments, § 254.

See also 8 C.J.S. 278, Bailments, § 28:

> "It is ordinarily stated that where a bailment is for the sole benefit of the bailor, the bailee is liable only for gross negligence or bad faith. . . . Primarily, gross negligence connotes the absence of slight care or diligence; and taking ordinary diligence or care and ordinary negligence as the mean of the so called three degrees of care and negligence, slight care may be described as a less degree of care than ordinary, and slight diligence as that diligence which persons of less than common prudence take of their own concerns. Gross negligence has been defined as an omission of the care which even the most inattentive and thoughtless never fail to take of their own concerns. . . ."

See also to the same effect, Prosser on Torts, 2nd ed., 148.

Again we quote from *United Fire Insurance Company v. Paramount Fur Service, Inc. supra*:

"Ordinarily such constructive bailee will receive nothing from the owner of the property and will have no right to recover from such owner anything for what he does in caring for such property so that he is in effect an uncompensated or so-called gratuitious bailee . . . Hence there is no more reason for the law imposing upon such constructive bailee any duty to the owner with respect to care for such property than there is for imposing such a duty on any other uncompensated or so-called gratuitous bailee. As a result no greater duty is ordinarily imposed upon such a constructive bailee. . . ."

The court further said:

"Although compensated bailee owes to his bailor a duty to exercise ordinary care to protect the bailed property, an uncompensated or so-called gratuitous bailee does not owe to his bailor a duty to exercise such care to protect the bailed property.

* * *

"Par. 3 and 4 of the Syllabus of Toledo & O. Central R. Co. v. Bowler & Burdick Co. 63 O. St. 274, 58 N.E. 813, state that there can 'not' be such gross negligence 'unless' there is 'that gross neglect of duty which amounts to willfulness and evinces a reckless disregard of the rights of others.'

". . . In deciding this case, it is sufficient to recognize, as all the authorities apparently do, that an uncompensated or so-called gratuitous bailee does not owe to the owner of the bailed property a duty to exercise ordinary care and hence *is not liable for mere negligence* with respect to the care of such property." (Emphasis ours.)

See also the cases cited in 96 A.L.R. at p. 909, et seq.

In submitting this case to the jury, the court took the view that the destruction of the owner's airplane by fire gave rise to an inference of negligence on the part of defendant which would support a verdict for the plaintiff. This is undoubtedly correct in cases of bailment *for hire* and the Utah cases clearly so hold. However, we find no case from Utah or any other jurisdiction where it has been held that the destruction of the bailed goods by fire gives rise to an inference of gross negligence on the part of a gratuitous bailee. In fact the authorities hold that where, as here, the bailor has knowledge as to the place and the manner in which the goods are to be held, he is presumed to assent that the goods shall be so treated and cannot maintain an action for loss or damage under such circumstances. See 6A Am. Jur. 366, Bailments, § 259:

> "*** However, a bailor knowing the general character and habits of a gratuitous bailee, and the place where and the manner in which goods deposited are to be kept, is presumed to assent that the goods shall be so treated, and cannot maintain an action for loss or damage under such circumstances."

To the same effect is 8 C.J.S., Bailments, Sec. 28:

> "So, where the bailor knows the habits of the bailee and the place and the manner in which the goods are to be kept, the law presumes his assent that his goods shall be thus treated, and, if lost or damaged he can maintain no action therefor."

Plaintiff failed to offer any specific evidence of gross negligence on the part of defendant. There is no authority which holds that destruction by fire, standing alone, is evidence of gross negligence, and where the owner has knowledge of the manner of storage, he consents and agrees to such storage. It follows, therefore, that there was no evidence to warrant the submission of this case to the jury on the negligence count, and a verdict should have been directed in favor of the defendant and against the plaintiff on that count, no cause of action.

POINT III.

THE COURT DID NOT CORRECTLY INSTRUCT THE JURY, AS TO THE RIGHTS OF PLAINTIFF, OR AS TO THE DUTIES OF DEFENDANT, OR AS TO THE LAW OF BAILMENT APPLICABLE TO THE FACTS OF THIS CASE.

If the court determines adversely to our position on the first two points, we further invite attention to the fact that defendant was, if a bailee, at all, only a constructive bailee and therefore held only to slight diligence or otherwise stated, liable only for gross negligence. However, in instructing the jury in its Instruction Number 6, the court instructed that if there was a bailment relationship, and if the defendant was guilty of negligence, a verdict could be returned in favor of the plaintiff on the negligence count. This was an incorrect statement of the law since as shown by the authorities heretofore cited, the burden was upon the plaintiff to prove not merely ordinary negligence, but gross neglience. Likewise, it was in-

correct to advise the jury that the mere destruction of the plane by fire while in the possession of the defendant gave rise to an inference of negligence. This would be true in a bailment for hire situation, but was not applicable to the case at bar. At the very least, the court should have instructed the jury that the fact that defendant was a gratuitous bailee, placed upon him a lesser duty of care than he would have had as a bailee for hire. It follows that the plaintiff's verdict should not be permitted to stand, and that even if the evidence was sufficient to submit to the jury, a new trial should be granted so that the jury might be properly instructed on the law applicable to the evidence offered and received.

CONCLUSION

Plaintiff failed to prove a submissible case on the theory of negligence. It follows that the judgment on the second count should be set aside, and judgment entered in favor of defendant, no cause of action, or in the alternative, a new trial should be granted.

Respectfully submitted,

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